

SIMBARASHE MAPURUDZA
versus

TRACY MUPONDA

HIGH COURT OF ZIMBABWE
ZISENGWE J
MASVINGO, 19 May & 20 July, 2022

P. Dube for the plaintiff
S. Silver for the defendant

Civil Trial - Divorce

ZISENGWE J: The parties to these divorce proceedings are in agreement that their marriage has irretrievably been broken down owing to a whole range of issues bedevilling it. They trade accusation and counter accusations on the cause of this marital disharmony. They however take no issue with its dissolution. They have also since agreed on a wide array of issues including the custody of their four minor children (which is to be awarded to the defendant) and access of the minor children by the plaintiff.

The parties have similarly agreed on the distribution of some of the movable and immovable assets acquired during the subsistence of their marriage. However, they haggle over the distribution of a number of properties both movable and immovable as well as the quantum of maintenance that the plaintiff should be ordered to contribute towards the upkeep of their four minor children. These were the issues referred to trial.

The background

The parties are married in terms of the Marriage Act [*Chapter 5:11*]. Their marriage having been solemnised on 19 December 2005. Their marriage was blessed with four minor children all of whom are still minors.

Lately however, their marriage has been rocked by disharmony resulting in the plaintiff instituting the current proceedings alleging a litany of problems afflicting it. Most importantly however is the mutual acceptance that there has been a total breakdown of trust, respect and communication as between them and the failure to share conjugal rights. They have therefore both resigned to the inevitable fate of their marriage namely an order for its dissolution.

Although the plaintiff initially asserted in his declaration that during the subsistence of their marriage the parties did not acquire any property worthy of distribution, in the wake of the defendant's plea and counter claim, he made an about turn and conceded that the parties did acquire certain properties both movable and immovable.

It soon became apparent that the parties did acquire some household goods, livestock and more importantly 4 pieces of immovable property namely Stand No. 342, Zaka; Stand No. 458 Kubatana, Epworth; Stand No. 800 Kubatana, Epworth and a general dealer shop and bar situate at Fusira Business Centre in Masvingo.

The parties subsequently exchanged various pleadings culminating in a Pre-trial Conference (PTC) being held before a Judge on 18 March, 2021, the salient aspects of whose outcome was as follows; That each party was to be awarded certain movable items consisting of a few household goods and livestock (excluding cattle), that the plaintiff was to be awarded two immovable properties namely Stand No. 342, Zaka, Jerera and Stand No. 458 Kubatana in Epworth and that the defendant would be awarded Stand No. 800 Epworth.

However, the PTC Referral Minute shows that the parties failed to agree on the quantum of maintenance to be contributed by the plaintiff in respect of each of the four minor children, who was to be awarded the ASUS laptop computer, how the 8 cattle should be shared as between the parties and how the general dealer shop referred to earlier was to be distributed.

In the trial that ensued the parties testified in their respective cases and whereas the plaintiff called two additional witnesses, the defendant only called one further witness.

With regards to the question of the quantum of maintenance that he should be ordered to pay, the plaintiff insisted that he could only afford a cumulative sum of \$15 000 for all four children chiefly owing to the fact that he is unemployed and has no source of regular income. He indicated in this regard that he was compelled to quit his employment at Renco Mine after being found to be medically unfit to undertake any meaningful physical work. He produced a medical report compiled by the mine doctor, Dr Shamu, wherein it was indicated that the plaintiff was afflicted by chronic arthritis which rendered it difficult for him to stand for sustained period of time. He therefore was left with no option but to quit his job as a “lasher”. His efforts to secure alternative employment elsewhere were fruitless other than a brief stint at a mine in Mashava which ended in him being laid off on account of his inability to perform vigorous manual labour as would be expected in his line of work.

He indicated that he now survives on odd jobs and more importantly that his living expenses far outstrip his income with the result that he relies on well-wishers to plug the difference. He would deny under cross examination that he has the capacity to do some other light work to sustain a living indicating as he did that mining was the only vocation known to him. He further pointed out that the defendant ha a legal obligation to contribute towards the upkeep of the children.

As far as the dispute and the cattle is concerned, he insisted that there are only five beasts remaining from the eight that were previously available at the time of the PTC, three of them having succumbed to some livestock disease. Needless to say, he disputed the defendant’s assertion that there are 14 cattle up for distribution.

He further specifically denied that one Tapiwa Marisa held in trust the 6 beasts for the parties. To that end he called the said Tapiwa Marisa as a witness who testified that he currently only holds one beast for the parties. He explained that although he was originally entrusted with the safekeeping of eight beasts for the parties, over the years, however, not only have the parties disposed of some of those beasts for lobola and other purposes but also that some have since succumbed to various illnesses leaving him with a single beast. He therefore categorically denied assertions put to him during cross examination that he is currently in possession of 6 beasts belonging to the parties. He also denied that he was tailoring his evidence to suit the plaintiff’s case.

As far as the laptop is concerned, the plaintiff testified that same was purchased for the sole use of his niece Rebecca from the proceeds of rentals collected from the latter's late parent's house in Kwekwe. He further indicated that he purchased the laptop from an outfit called *Fast Printers* situate at the Main Post Office in Harare and produced a receipt for the said purchase. It goes without saying that he would refute defendant's version of the acquisition of the laptop which suggests that it was bought in South Africa by her (i.e., defendant's) brother.

In her evidence, the plaintiff's niece Rebecca Mapurudza confirmed the plaintiff's version regarding the place, purpose and source of the funds for the acquisition of the laptop. She therefore insisted that the laptop belongs to her and disputed the defendant's version that it was intended for the parties' children.

Regarding the final item up for distribution namely the general dealer shop and bar situate at Fusira business centre, Masvingo, the plaintiff while indicating that he is in principle amenable to the proposal to have the same awarded to and registered in the names of their four children, nonetheless expressed serious reservations of the practicality of such an order. He pointed to the fact that the children who are still in school lack the capacity to operate the said shop coupled with the outstanding debt owed to the local authority as some of the practical reasons militating against such a course of action.

In her evidence, the defendant scoffed at the ZWL15 000 monthly maintenance offered by the plaintiff for the 4 children indicating that it is grossly inadequate when juxtaposed against the prevalent high cost of living coupled with the day to day needs of the children. She proposed a figure double that offered by the plaintiff.

The defendant is employed at Renco Mine as a security guard earning a gross salary of ZWL\$50 000. Although she was unable to produce documentary proof to substantiate the same, she insisted that she is saddled with a ZWL\$25 000 loan repayment obligation leaving her with a net income of ZWL\$25 000. She indicated that her net salary scarcely suffices to meet the children's day to day needs let alone their educational requirements.

She disputed plaintiff's version that he was laid off on account of his health concerns but that he voluntarily quit his job to spite her and frustrate her maintenance claim which she had instituted in the Magistrates Court. She further indicated that even if plaintiff is unemployed, he

should not sit on his laurels but embark on income generating projects to meet his legal obligation to support his children.

Regarding the disputed number of cattle, the defendant in her evidence persisted with her claim that the parties own a total of 14 beasts all of them currently in the possession of third parties entrusted with their safe keeping. She gave the breakdown as follows, that 6 were being kept by one Tapiwa Marisa, five were in the possession of a person called Simbarashe and three were in the custody of one Peter.

She however conceded under cross examination that she was not in possession of a stock card or stock cards to buttress her claim. She also indicated that she only did her investigative work to establish the true number of the beasts after the PTC and that is when she established that there were in fact 14 beasts for distribution. She further declared that the plaintiff was driven by greed to misrepresent to the court that there are only 5 beasts remaining. She therefore requested to be awarded an equal share of those 14 cattle.

As regards the disputed ASUS laptop computer she was adamant that it was purchased by her brother in South Africa from contributions made by both parties. She was equally persistent with her assertion that the said laptop was never meant for the plaintiff's niece, Rebecca, but for their own biological children.

She accordingly called her brother Clive Muponda who insisted that he had purchased the said laptop at a Game Shop in South Africa in December 2018 for the price of ZAR4000. He indicated that he even contributed the sum of ZAR1000 as the amount he had been given by the parties was insufficient. He was however unable to produce any documentation in support of his evidence.

Proceedings now to deal with the resolution of each of the four contested issues starting with the question of the quantum of maintenance.

The quantum of maintenance

It is common cause that the marriage of the parties was blessed with children all of whom are still minors namely;

Takunda James Mapurudza born on 28 January 2005

Simbarashe Junior Mapurudza born on 19 July 2008

Nokutenda Justice Mapurudza born on 19 April 2016

Ropafadzo Jubilee Mapurudza born on 6 October 2019

The parties acknowledge the legal obligation reposed on them to contribute towards the upkeep of their children. However, they part ways when it comes to the quantum of maintenance the plaintiff should be required to contribute in this regard.

One of the pre-requisites for the granting of an order of maintenance is proof of the ability of the parent to so meet his maintenance obligation. Section 7(1)(b) of the Matrimonial Causes Act [*Chapter 5:13*] provides that in granting a decree of divorce the court make an order with regard to the payment of maintenance, whether by way of periodical payments, in favour of one or other of the spouses of any child of the marriage. Subsection (4) of the same Act, provides the maintenance order that the court making the maintenance order shall have regard to the following;

- (a) the income earning capacity, assets and other financial resources which each spouse and child had or is likely to have in the foreseeable future;*
- (b) the financial needs, obligations and responsibilities which each spouse and child has or is likely to have in the foreseeable future;*
- (c) the standard of living of the family, including the manner in which any child was being educated or trained or expected to be educated or trained.*

In the present case, the plaintiff is currently unemployed and is struggling to make ends meet. He indicated that in part he survives on odd jobs and on the charity of well-wishers. The defendant has not been able to controvert those assertions in any meaningful way. Although one empathises with the defendant who is ultimately left to shoulder the responsibility of looking after the children as well as the children themselves whose standard of living will probably plummet, it is wholly illogical to order the plaintiff to pay a monthly sum of maintenance he cannot afford currently.

Although the defendant sought to convince the court that the plaintiff voluntarily relinquished his position at Renco Mine to frustrate a maintenance claim she had instituted in the Magistrate's Court before the institution of these divorce proceedings, the evidence placed before me do not support such a contention.

Ultimately therefore I believe the quantum offered by the plaintiff is not unreasonable regard being had to his current rather impecunious position. An order of ZWL\$4 000 per month per child would therefore be appropriate.

The laptop computer

The plaintiff's position that this gadget was procured for the purpose of Rebecca's academic pursuits in electrical engineering accords more with logic and common sense as opposed to the defendant's version. Further it was supported by documentary evidence in the form of receipts for its purchase.

The defendant's brother was at pains to explain how he supposedly imported the laptop from South Arica and failed to produce any documentation of supposedly confirmation of such importation. He was unable to provide declarations with the department of customs at port of entry and proof of payment of the relevant duty leaving his evidence mere bald and unsubstantiated assertions.

From the evidence at my disposal therefore I find on balance that the laptop belongs to a third party (Rebecca Mapurudza) and was acquired through funds from rentals received from the letting out of Rebecca Mapurudza's parent's house. The laptop will therefore be excluded from the distribution equation.

The cattle

The PTC Referral Minute shows that as of that date, the parties were in *ad idem* that there were eight cattle for distribution. The belated attempts by the defendant, after that stage to suggest that she subsequently discovered that there were in fact fourteen head of cattle cannot be sustained.

Further, the defendant's evidence that she discovered that the fourteen beasts were in the position of third parties whom she was unable to bring as witnesses for the trial remains a bald unsubstantiated assertion. In any event, one of the persons supposedly in possession of six of those beasts namely Tapiwa Maria completely denied the existence of such a number insisting as he did that he only holds a single beast on behalf of the parties.

On the other hand, the stock card produced by the plaintiff indicates the existence of six beasts consisting of 1 cow, 2 bulls and 3 oxen. It is strange that he failed to communicate with the defendant of the supposed death of the other 2 beasts something he was reasonably expected to have done given the stage they had reached in these divorce proceedings. Ultimately therefore, the distribution on the beasts will be undertaken on the basis of the number that the parties agreed existed as of the time of the PTC namely eight and each party will be entitled to half that number.

The General Dealer Shop/Bar at Fusira, Masvingo

The parties were somewhat ambivalent as regarding to its eventual fate. They tentatively agreed to it being awarded to and registered in the names of the four children in equal shares. However, in the course of the trial, the plaintiff expressed reservations regarding the practicality of pursuing such a course of action indicating as he did that the shop itself is encumbered with an outstanding debt with the local authority from which it was purchased.

Further he indicated that he is neither in a position to settle the outstanding arrears nor to meet the costs of the transfer as proposed by the defendant. He therefore suggested that the building be sold and that the proceeds thereof (less the costs owed to the local authority) be shared equally as between the parties 4 minor children.

The defendant on the other hand insisted that the property be transferred to the children in undivided shares and that the parties be ordered to meet half the share of the transfer costs and the outstanding arrears with the local authority.

It would be inequitable, in my view, to saddle the plaintiff with the costs of transfer and the arrears in circumstances such as the present where he is essentially donating his share of the shop to his children. His proposal is therefore not unreasonable.

However, since defendant is insistent on the retention of the property in question subject to it being transferred to the children, it is only fair that she be made to bear the costs attending to such a course of action. In the event of her failure to do so within a specified period then the plaintiff's proposal would ensue.

In the final analysis therefore, the following order which incorporates all the issues is hereby made;

ORDER

IT IS HEREBY ORDERED AS FOLLOWS;

1. A decree of divorce be and is hereby granted.
2. **Custody of the minor children**

The custody of each of the 4 minor children namely;

Takunda James Mapurudza, born 28 January 2005

Simbarashe Junior Mapurudza born 19 July 2008
Nokutenda Justice Mapurudza, born 19 February 2011
Ropafadzo Jubilee Mapurudza, born 6 October 2019
is hereby awarded to the defendant.

3. Maintenance

The plaintiff is hereby ordered to contribute ZWL\$4000 per month for each of the four minor children until each child attains the age of 18 years or become self-supporting whichever comes first.

3.1. Payment to be done through defendant's **Steward Bank**, Masvingo Branch, Account No. **2001794907**

4. Access

The plaintiff to exercise access of the 4 minor children every alternate weekend and every alternate school holiday.

5. Distribution of movable property

5.1. The following movable property is awarded to the plaintiff

- (a) 4 head of cattle
- (b) One sheep
- (c) One deep freezer
- (d) One incubator
- (e) One wheel barrow
- (f) One base bed
- (g) One agent line
- (h) Two goats

5.2. The following movable property is awarded to the defendant

- (a) 4 head of cattle
- (b) One sheep
- (c) One deep freezer
- (d) TV Set and TV stand
- (e) 2 plate stove
- (f) One base bed

- (g) 2 agent lines
- (h) All kitchen utensils
- (i) 3 goats

5.3. The ASUS laptop computer is not matrimonial property and is hereby excluded from distribution.

6. Immovable property

6.1. The following immovable property is hereby awarded to the plaintiff

- (a) Stand No. 342 Zaka, Jerera registered in the seller's name and the plaintiff to meet costs of transfer thereof.
- (b) Stand No. 458 Kubatana, Epworth registered in the seller's name and plaintiff to meet costs of transfer thereof.

6.2. The following immovable property is hereby awarded to the defendant

- (a) Stand No. 800 Kubatana, Epworth registered in defendant's name.

7. Regarding the General Dealer Shop and Bar situate at Fusira Business Centre registered in the name of the plaintiff, the following order is hereby made;

- (a) The defendant to register the said property in the names of the four minor children referred to in (2) above in equal shares and undivided shares within 12 months of this order and the defendant to settle the arrears with the local authority and to meet all related costs of transfer.
- (b) In the event of the defendant failing to effect transfer referred as per paragraph 7(a) above, the said property to be sold by private treaty to the best advantage of the parties and the proceeds thereof, less any arrears paid to the local authority, be shared equally among the parties' four minor children.

8. There shall be no order as to costs.

Mangwana and Partners, plaintiff's legal practitioners
Legal Aid Directorate, defendant's legal practitioners